

DEC 26 1972

MICHAEL SODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1182

G. RAYMOND ARNETT, as Director of the Department
of Fish and Game of the State of California,
Plaintiff and Respondent,

vs.

5 GILL NETS, etc.,

Defendant,

RAYMOND MATTZ,

Intervenor and Petitioner.

Respondent's Supplemental Reply Brief

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The respondent respectfully submits this supplemental reply brief to the Court under Rule 24, in the expectation that the brief will provide further information to the Court in acting upon the intervenor's petition for writ of certiorari.

I.

**THE CONGRESSIONAL HISTORY SURROUNDING THE 1892 ACT
INDICATES THAT THE KLAMATH RIVER RESERVATION WAS
NOT EXPECTED TO SURVIVE THE ACT.**

The respondent contends that the former Klamath River Reservation, which was located on the lower twenty miles

of the Klamath River, ceased to be a reservation by virtue of a congressional enactment in 1892. See 27 Stat. 52. This enactment, which provided for entry, settlement and purchase of the lands of the former reservation, was based on a bill introduced into the House of Representatives, H.R. 38. The congressional history surrounding the bill strongly supports the position of the respondent.

H.R. 38 was accompanied by a House report, Report No. 161. This report stated in part,

"The land referred to in the bill under consideration was set apart as an Indian reservation by an Executive order dated November 16, 1855. *It has not, in fact, been used by the Government as a reservation since the winter of 1861-62. . . .*

"[T]his reservation, under the provisions of the act of Congress just referred to, became abandoned in law, as it has been in fact, since the winter of 1861-62.

. . .
 "As this land does not constitute an Indian reservation, and has not been used as such for about twenty-eight years, there does not appear to be any reasonable objection to the passage of the present bill

"[T]his bill simply proposes that the land formerly set apart as a reservation, but now abandoned as above stated, shall be disposed of, as are other lands of the same class or quality, under the general laws of the United States, giving to those who have settled upon them in good faith the prior right to enter that portion upon which settlement has been made.

"The few Indians now on this tract, variously estimated to be from fifty to one hundred in number, occupy small villages at or near the mouth of Klamath River. . . .

"These Indians have not, since the abandonment of this reservation, been in any manner cared for, aided or instructed in the ways of civilization by the Government. This duty the Government may hereafter desire to perform, and to this end, and as a matter of justice

to these Indians and their children, we think the proceeds to be derived from the sale of these lands should constitute a fund to be used for their removal, maintenance, and education, when in the judgment of the Secretary of the Interior their interests require an expenditure for such purpose." H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892). (Emphasis added.)

The bill was originally considered in the House. The bill's spokesman, Representative Geary, stated during the House debates, in urging the bill's passage,

"The land embraced in this bill was originally an Indian reservation. *In 1861 it was abandoned, and never since has been used for that purpose. Since 1868 it has been occupied by settlers,* and this merely authorizes the Land Department to enable them to acquire title to the land which they occupy. . . .

"All the land in this reservation has been taken up by settlers. . . . The land is all occupied, and the settlers have filed their claims, but the Land Department cannot take action on them until Congress passes this act." 23 Cong. Rec. 1598-99 (1892). (Emphasis added.)

After passage in the House, the bill was sent to the Senate. The spokesman for the bill in the Senate, Senator Felton, declared during the senate debate,

"The Klamath Indian Reservation was set apart by a proclamation of the president some twenty years ago, I think. . . . *It never has been used as an Indian reservation. . . .*"

"There is an Indian reservation within 20 miles of the river, where these Indians can go if they want to do so. The number is variously estimated at from 40 to 60 Indians. . . .

"The bill makes provision for them to select allotments in severalty; and if they have Indian villages, which they have not, it allows them to retain those,

and it gives them a year's time within which to make selections. . . .

"There are a great many settlers upon that land. It is not practically an Indian reservation. It never has been used for that purpose. The provisions of the bill open the land to settlers after providing, as I stated before, in regard to the Indians, and lands more valuable for timber or mineral deposits shall be entered under the timber act and the mineral land laws. . . . A few of these Indians live at the mouth of the river. . . ." 23 Cong. Rec. 3918-19 (1902). (Emphasis added.)

Thus, it is eminently clear that Congress, in passing the bill, did not expect that the lands on the former Klamath River Reservation should continue to have reservation status. Indeed, Congress did not even regard these lands as having such status prior to the bill's passage. Based on the House report and the statements of the bill's spokesmen, Congress understood that the reservation was "abandoned," and that the land thereon "does not constitute an Indian reservation." Whether the land was a reservation immediately prior to the bill's passage is arguable, since an 1891 executive order suggests that such a reservation might have been created by the order. See I Kappler, *Indians Affairs: Laws and Treaties* 815. But the status of these lands prior to the 1892 act is not relevant. What is relevant is that Congress, in understanding these lands not to have reservation status prior to the act, clearly did not intend for these lands to have such status thereafter. Therefore, if the lands were a reservation prior to the act, they ceased to be a reservation by virtue of the act.

Such congressional history shows that the 1892 act was passed in order to open up the lands of the former reservation for entry and settlement by non-Indians. According to this history, most of the land was occupied by the many

settlers who wished to own and develop their holdings. The land no longer functioned as a reservation, Congress was informed, and the few Indians on the land were to be protected by allotments which would enable them to similarly own and develop their holdings. Therefore, the 1892 act was intended to promote the development by non-Indians of lands on a "former," "abandoned" reservation. This congressional intention is inconsistent with a continuation of the reservation status of these lands. Hence, if the reservation existed prior to the act, it was certainly repealed by the act.

II.

A 1909 MAP, AS WELL AS CURRENT MAPS, ISSUED BY THE FEDERAL GOVERNMENT INDICATE THAT THE LOWER TWENTY MILES OF THE KLAMATH RIVER IS NO LONGER CONSIDERED A RESERVATION.

The executive branch of the federal government apparently took the position in 1909 that the 1892 act terminated the reservation status of the former Klamath River Reservation. President Theodore Roosevelt issued a proclamation that year which altered the boundaries of the Trinity National Forest in California. Two maps, compiled by the Forest Service of the U. S. Department of Agriculture, were affixed to the proclamation. See Sen. Doc., Vol. 27, 62d Cong. 2d Sess. (3 Indian Affairs: Laws and Treaties) 646-49 (1909).¹ These maps, particularly the small scale map (*id.* at 648), show the boundaries of an area covering the *upper* twenty miles of the Klamath River, which is described thereon as the "Hoopa Valley Indian Reservation." Significantly, a boundary line is clearly drawn on the maps at the northern end of this extension of the Hoopa Valley

1. A copy of this proclamation is appended hereto as Appendix 1.

Reservation. This line differentiates this reservation extension from the *lower* twenty miles of the river, which is the location of the former Klamath River Reservation. Therefore, the maps unequivocally indicate that the reservation status accorded to the upper twenty miles of the river is not similarly accorded to the lower twenty miles. The particular significance of the maps is that, by virtue of their compilation in 1909, they are fairly contemporaneous to the 1892 act. Also, since the maps were incorporated in a presidential proclamation, they represent an expression by the highest executive officer in the federal government.

The 1909 maps are not the only cartographic expressions by the federal government concerning the status of the former Klamath River Reservation. To the contrary, the Geologic Survey unit of the U. S. Department of the Interior has published many maps which similarly show a boundary line limiting the extension of the Hoopa Valley Reservation to the upper twenty miles of the river.² These maps are based on the "15 Minute Series (Topographic)" map of the Geologic Survey for the Tectah Creek Quadrangle.³ This latter map, compiled by the Army Corps of Engineers, clearly establishes the boundary of the reservation extension at a point approximately twenty miles upstream, and thus excludes the former Klamath River Reservation from the reservation extension. Therefore, the federal government continues to regard the lower twenty miles of the Klamath River as having lost its reservation status.

2. These maps, which are large and cumbersome, will be made available to the Court, if the Court wishes.

3. A copy of this map is appended hereto as Appendix B. For purposes of legibility, the boundary line has been retraced in heavy pencil prior to the photocopying process.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated: December 22, 1972

Respectfully submitted,

EVELLE J. YOUNGER

Attorney General of the State of
California

CARL BORONKAY

Assistant Attorney General

RODERICK WALSTON

Deputy Attorney General

Attorneys for Respondent

Mar. 2, 1909.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
A PROCLAMATION

Proclamations.
16 Stat., Part 2, 2243.

Trinity National Forest,
Cal.
Proclamation.
16 Stat., Part 1, 3235.

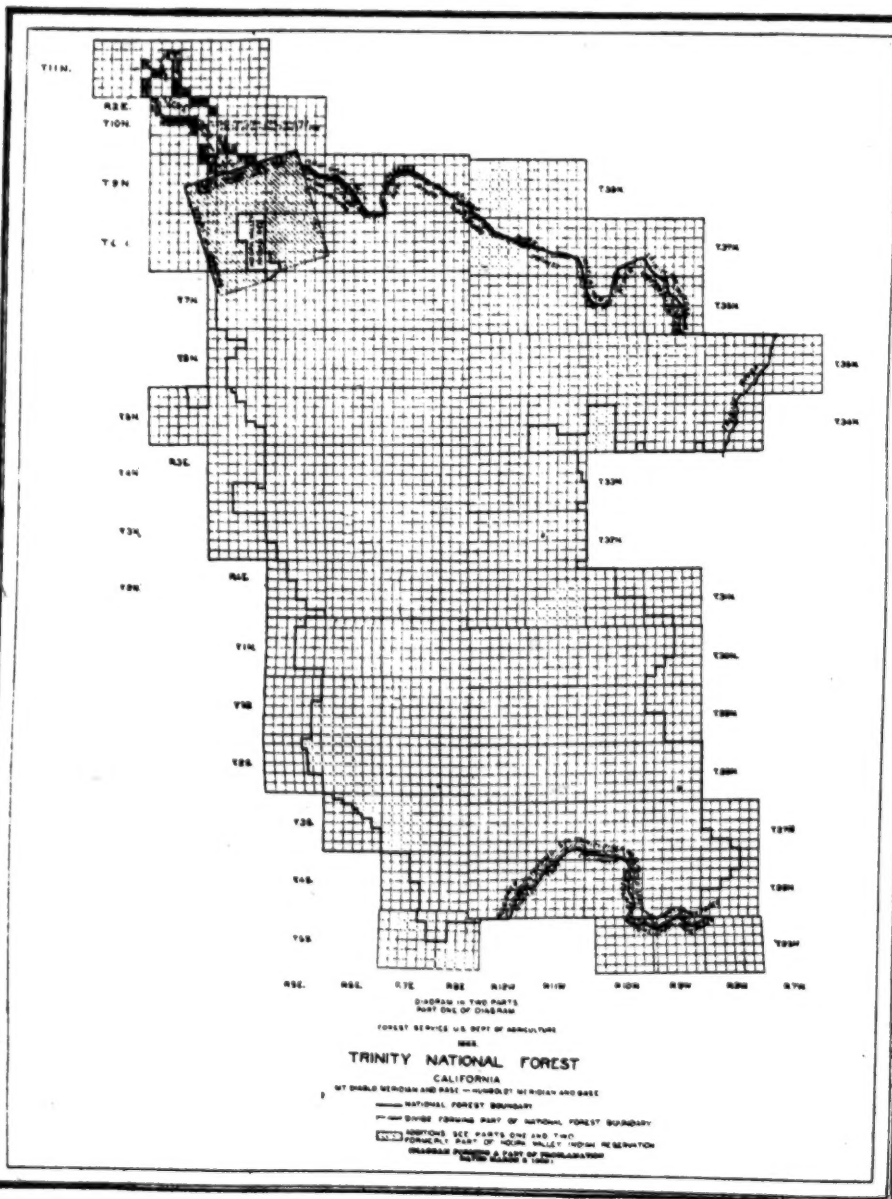
WHEREAS, an Executive Order dated July second, nineteen hundred and eight, changed the boundaries of the Trinity National Forest to embrace portions of the Trinity, Shasta, Klamath, and Stony Creek National Forests;

And whereas, it appears that the public good will be promoted by including in the Trinity National Forest certain lands within the State of California, shown on the diagram hereto attached and forming a part hereof, which are in part covered with timber, and which constitute a part of the Hoopa Valley Indian Reservation, established by Executive Order dated June twenty-third, eighteen hundred and seventy-six, and modified by subsequent Orders;

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by the Act of Congress, approved June fourth, eighteen hundred and ninety-seven, entitled, "An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen

Boundaries enlarged.
26 Stat., 1103.

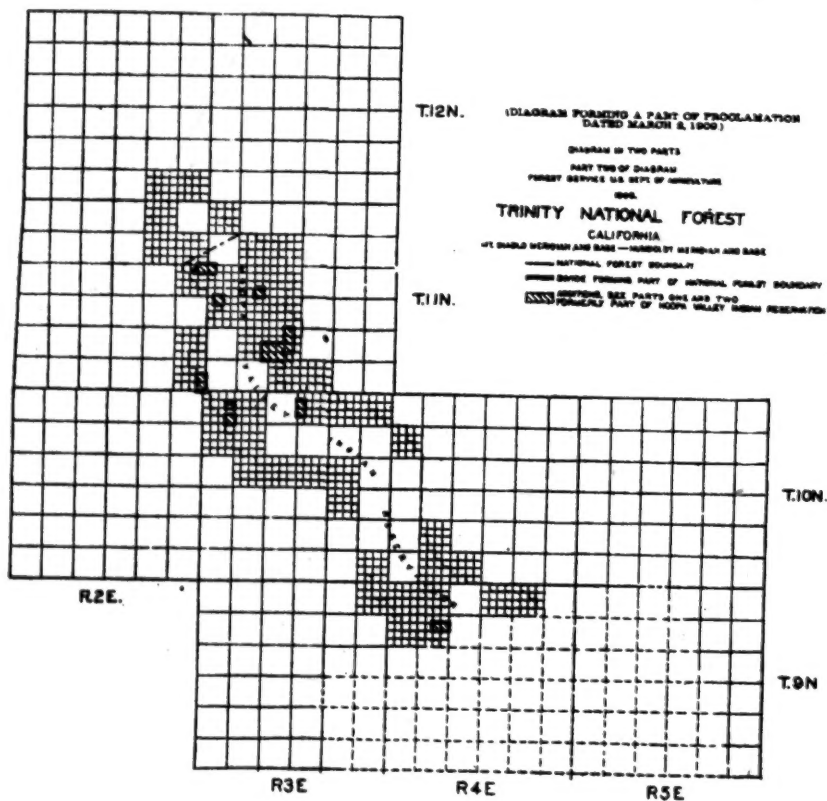
hundred and ninety-eight, and for other purposes," do proclaim that the said lands are hereby added to the Trinity National Forest and that the boundaries of said National Forest are now as shown on the two parts of the said diagram, and such National Forest so enlarged



shall, except as hereinafter provided, be subject to all the laws affecting National Forests, including the mineral land laws of the United States; *Provided*, that nothing herein shall, for the term of twenty-five years from the date hereof, operate to terminate or abridge the

Provision.
Use for Indians.

rights of the Secretary of the Interior and of the Commissioner of Indian Affairs, under existing laws, to allot to individual Indians any of such of the above described lands as were included in the said Hoopa Valley Indian Reservation by the said Executive Order modified as aforesaid; to use any of such lands or the timber thereon for Agency, school, or other tribal purposes; to permit the use of any of such lands for grazing purposes; to permit the free use by individual Indians of timber and stone from any of said lands necessary for domestic use upon their allotments; to dispose of the proceeds arising from grazing as provided for by law for other Indian



Regulations, etc.

funds; and to dispose of the dead timber standing or fallen upon such lands; *Provided further*, that said powers and rights of the Secretary of the Interior and Commissioner of Indian Affairs or permittees under or through them or either of them, and of individual Indians, except as to allotments to such Indians, shall be subject to such rules and regulations as the Secretary of Agriculture may from time to time prescribe for the protection of the National Forest; and said powers and rights shall not be construed to apply to any land except such parts of said Hoopa Valley Indian Reservation as are included in the Forest by this proclamation, and all said powers and rights

cept the rights of individual Indians and their heirs to hold and enjoy their allotments, shall cease and determine twenty-five years after the date hereof, and thereafter the occupancy and use of the allotted parts of said lands shall in all respects be subject to the laws governing National Forests.

The withdrawal made by this proclamation shall, as to all lands which are at this date legally appropriated under the public land laws reserved or used for Indian Agency, school, or church purposes, reserved for any public purpose other than for Indian occupancy and use under such Executive Orders, be subject to, and shall not interfere with, or defeat legal rights under such appropriation, or prevent the use for such public purpose of lands so reserved, so long as such appropriation is legally maintained, or such reservation remains in force.

Prior rights not affected.

This proclamation shall not prevent the settlement and entry of lands heretofore opened to settlement and entry under the Act of Congress approved June eleventh, nineteen hundred and six, entitled, "An Act to provide for the entry of Agricultural lands within forest reserves."

Agricultural lands.
34 Stat., 233.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this second day of March, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-third

THEODORE ROOSEVELT

By the President:

ROBERT BACON

Secretary of State.

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71 - 1182

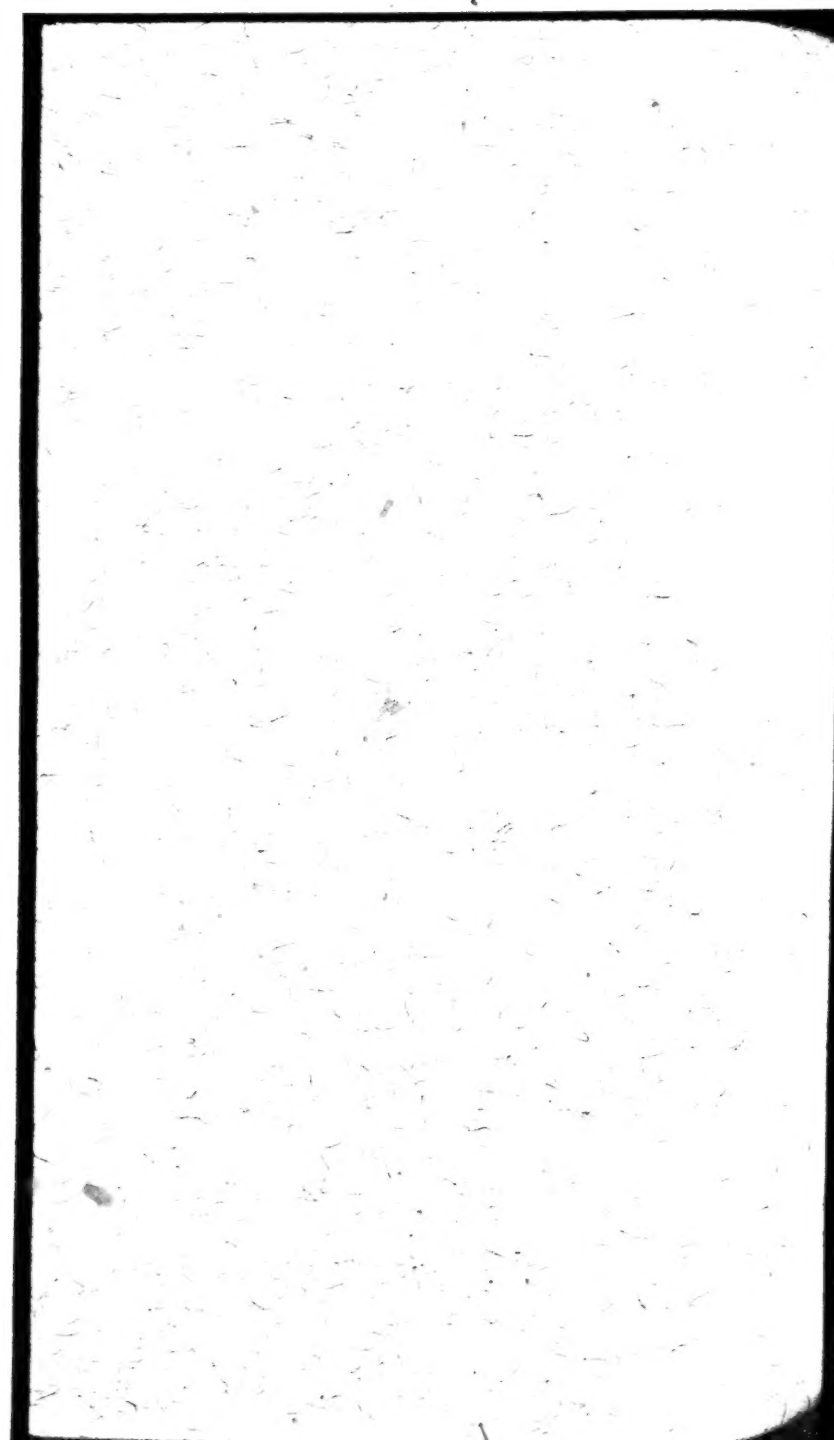
RAYMOND MATTZ,
Petitioner

v.

G. RAYMOND ARNETT,
Respondent

SECOND REPLY BRIEF

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SECOND REPLY BRIEF

BASIS FOR BRIEF

This brief is a response to matters first raised by Respondent's Supplemental Reply Brief.

I

THE LEGISLATIVE HISTORY OF 27
STAT. 52 SHOWS NO INTENT TO
TERMINATE THE RESERVATION
STATUS OF THE LOWER TWENTY
MILES OF THE HOOPA EXTENSION

A statute removes land from an Indian reservation only when Congress clearly intends that to happen. (See United States v. Clestine, 215 U.S. 278, 290-291 (1909).) No such clear intent is apparent in the legislative history of the Act of June 17, 1892 (27 Stat. 52).

The "abandoned," "former" reservation referred to in the legislative history of 27 Stat. 52 is the Klamath River Reservation not the Hoopa Valley Extension. The former was established by Executive Order in 1855 and extinguished by the Act of April 8, 1864. The latter was created by the Executive Order of October 16, 1891 and approximately half of it was formed from lands of the abolished Klamath River Reservation. In opening part of the Hoopa Extension to non-Indian settlement, the Act of June 17, 1892 demarcated the opened "surplus" territory as "lands embraced in what was the Klamath River Reservation."

That the Klamath River Reservation, rather than the 1891 Hoopa Extension, is the "former" reservation Congress had in mind is evident even from the report and debates excerpted by Respondent. The committee report excerpts, for instance, state:

"The land referred to in the bill under consideration was set apart as an Indian reservation by an Executive Order dated November 16, 1855....[T]his reservation...became abandoned...since the winter of 1861-62....This bill simply proposes that the land formerly set apart as a reservation, but now abandoned as above stated, shall be disposed of...."

The full legislative history¹ removes any doubt concerning which "former" reservation congress was considering. The House report (No. 161, 52d Cong., 1st Sess.) points out that the Klamath River Reservation ceased to exist because the Act of April 8, 1864, expressly provided for disposal of reservations not included in the four reservations authorized by that act.

Congress did not even mention the Hoopa Valley Extension in its debates or reports on the 1892 Act. It was apparently unaware that a few months earlier the President had issued an Executive Order extending the Hoopa Reservation down the Klamath River from the Hoopa Square to the Ocean.

1. 23 Cong. Rec. 125, 870, 1598-1599, 2301, 3918-3919, 3969, 4158, 4225, 4245, 4417, 4714, 4771, 4893, 5012, 5052, 5738.

The House Committee report says in that regard:

"The Hoopa Valley Reservation is only about 20 miles to the east of the eastern boundary of this tract."

Senator Felton said:

"There is an Indian reservation within 20 miles of the river, where these Indians [of the lower twenty] can go if they want to do so." (23 Cong. Rec. 3918-3919.)

Obviously the House and Senate had no intent, let alone a clear interest (Celestine, supra), to terminate part of a reservation (the Hoopa Extension) which Congress had not even discussed. Congress merely wanted to sell (for the Indians' benefit) parcels of land which Congress felt were surplus to the Indians' needs. Such sales to non-Indian homesteaders are consistent with continued reservation status for the area out of which the parcels were sold. (Seymour v. Superintendent, 368 U.S. 351 (1962).)

Moreover, Congress explicitly contemplated continued Indian use of the lower twenty miles along the Klamath River. The 1892 act which is at issue in this case provided for the Secretary of the Interior to reserve Indian villages and settlements for continued Indian use. Also, H.R. 38 originally provided for removal of Indians from the lower twenty. (23 Cong. Rec. 1599.) The Senate deleted the removal provision (23 Cong. Rec. 3918); and the law as adopted provided that Indians had a preferential

right to allotments of land they occupied on the lower twenty prior to the statute's passage.

The legislative history of 25 Stat. 52 is therefore fully consistent with reservation status for the lower twenty miles of the Hoopa Extension.

II

INTERIOR DEPARTMENT MAPS, BOTH FROM 1892 AND TODAY, SHOW THE LOWER TWENTY MILES OF THE EXTENSION AS PART OF AN INDIAN RESERVATION

Respondent seeks to prop up its arguments with a 1909 Forrest Service map and a 1952 Geological Survey map.

The 1909 map is not contemporaneous with the 1892 act opening the Extension to non-Indian settlement. By contrast, an 1892 map by the Bureau of Indian Affairs--the agency charged with administration of Indian affairs--shows the whole distance from the Pacific to the Hoopa Square as part of an Indian reservation, although it is erroneously labeled as the Klamath River Reservation. (Sixty First Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1892).)

The 1952 Geological Survey map is no longer authoritative. Sheet 272 of the official United States National Atlas shows the lower twenty miles of the Extension as Indian reservation. That Atlas was issued by the Interior Department in 1970 and sheet 272 was prepared by the Geological Survey.

Other current Interior Department maps are consistent with the National Atlas. Appendix A, taken from a Bureau of Indian Affairs map showing Indian Land Areas as of 1971, shows the Hoopa Valley Extension Reservation as separate from the Hoopa Valley Reservation but nevertheless running out to the Pacific Ocean. Appendix B is a Bureau of Land Management map. (RESOURCES AND RECREATION, PUBLIC LANDS, CALIFORNIA, AFOOAMA-67/1910.) The BLM map shows one reservation encompassing the Hoopa Square and all the land for one mile on either side of the Klamath River from the Hoopa Square to the Ocean.

No inferences against the reservation status of the lower twenty miles of the Extension should be drawn from the inconsistent mapmaking in 1908 and 1952. (Cf. City of New Town v. United States, 454 F.2d 121, 125-126 (8th Cir. 1972).)

CONCLUSION

The petition for a writ of certiorari in this case should be granted.

DATED: January 4, 1973

Respectfully submitted

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WILLIAM P. LAMB
ROBERT J. DONOVAN
CALIFORNIA INDIAN LEGAL SERVICES

By: 

Lee J. Sclar

INDIAN LANDS

And Related Facilities as of 1971

Compiled by the Bureau of Indian Affairs
in cooperation with the
Geological Survey

Legend

☐ Federal Indian Reservation

☐ Former Reservations in Oklahoma

☐ Existing Tourist Complex

☐ Planned Tourist Complex

☐ Interstate Highway

☐ National Forest

☐ National Park or Monument

☐ National Wildlife Refuge

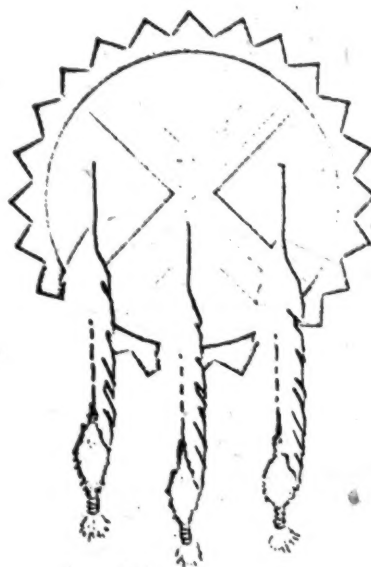
State Reservations
Nos. 1-26

Indian Groups Without Trust Land
Nos. 30-67

Federally Terminated Tribes and Groups
Nos. 80-93

*Iroquois (New York State)—
largely State-Supervised;
Federal consent required for
alienation of land; some Federal
programs available

INDIAN LAND AREAS GENERAL



U. S. Department of the Interior
Bureau of Indian Affairs

For sale by the Superintendent of Documents
U.S. Government Printing Office
Washington, D.C. 20540 • Price 35 cents

APPENDIX A

